No. 85-1066

Supreme Court, U.S.
FILED
JUN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCT. TERM, 1985

JAMES G. MARTIN, *et al.*,

Appellants,

v.

TERRY L. HAITH,

Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

APPELLANTS' REPLY TO BRIEF FOR THE UNITED STATES

LACY H. THORNBURG
Attorney General, State of
North Carolina

*JAMES WALLACE, JR.
Assistant Attorney General
Office of the Attorney General
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7218

ATTORNEYS FOR APPELLANTS
*Counsel of Record

ALPHA GRAPHICS, INC., • WASHINGTON, D.C. • (202) 331-8101

No. 85-1066

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES G. MARTIN, *et al.*,

Appellant,

v.

TERRY L. HAITH,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

APPELLANTS' REPLY TO BRIEF FOR THE UNITED STATES

The Solicitor General in his brief does not even acknowledge, much less apply, the standard devised by this Court for determining whether a particular governmental enactment is subject to preclearance under § 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Almost every governmental decision could arguably have an effect on voting. A decision to raise the salaries of public officials could influence the decisions of potential candidates; a decision to reduce appropriations to public transportation could make it more difficult for voters to get to the polls. Knowing that no such fanciful purpose could have been entertained by Congress in enacting § 5, this Court has plainly stated the rule to determine whether a particular action must be submitted:

> Thus, in determining if an enactment triggers § 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether

> it has a *potential* for discrimination. See *Georgia v. United States,* [411 U.S. 526,] 534 [(1973)]; *Perkins v. Matthews,* [400 U.S. 379,] 383-385 [(1971)]; *Allen v. State Board of Elections,* [393 U.S. 544,] 555-556, n. 19, 558-559, 570-571 [(1969)].

Dougherty County, Georgia, Board of Education v. White, 439 U.S. 32, 42 (1978) (emphasis in original). Neither the Solicitor General, the appellees, nor the District Court has identified any potential for discrimination in any of the enactments which form the subject of this appeal. This Court certainly cannot affirm summarily this unprecedented application of the Voting Rights Act without making some determination that some potential for discrimination exists.

The burden cannot be upon the State to identify all possible theories of discrimination and to rebut each of them. It is clear that no such burden exists with regard to any aspect of § 5. This Court explained as much in its original decision upholding the constitutionality of the Act. Discussing the provisions of § 4 of the Act, 42 U.S.C. 1973b, which permit a jurisdiction to bail out from § 5 coverage, this Court stated that "an area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past five years and then refute whatever evidence to the contrary may be adduced by the Federal Government." *South Carolina v. Katzenbach,* 383 U.S. 301, 332 (1965). The majority of the Senate Judiciary Committee in 1982 endorsed the continued application of this principle to the amended bailout procedure: "[S]hould the Justice Department or an intervenor alleges [*sic*] that specific practices or election methods, other than those analyzed by the applicant—do discriminate, the applicant would have to satisfy the court as to those." S. Rep. No. 97-417, 97th Cong., 2d Sess. 54 (1982). The principle of rebutting the allegations made by other parties also applies to the jurisdiction's burden of proof under § 5 in demonstrating whether a provision has the purpose or effect of denying or abridging the right to vote on the basis of race or color. *South Carolina v. Katzenbach, supra,* at 335. The same principle should apply in determining whether a particular enactment is subject to the provisions of § 5 in the first place. While the State may retain the ultimate burden of persuasion on the issue, at least

the plaintiff or the Justice Department should be required to identify the potential for discrimination which the State is expected to rebut.

Although the Solicitor General's brief contains no such allegations of potential for discrimination, he has filed with the Court a copy of the letter of April 11, 1986, from the Assistant Attorney General for Civil Rights to the State objecting to certain of the enactments involved in this appeal. The letter declares:

> The use of numbered posts, in combination with staggered terms for superior court judgeships in some districts, precludes minority voters from effective use of the election technique of single-shot voting, a technique that was available prior to the 1965 change. The elmination of the opportunity to single-shot vote plainly has a retrogressive effect in some districts on the ability of the minority community to participate meaningfully in the election of superior court judges. See, *e.g., City of Rome v. United States, supra,* 446 U.S. [156,] 183-85 [(1980)]. Our analysis indicates that the covered districts with minority voting age population of sufficient size to make single-shot voting effective are Districts 9, 12, and 18, as well as potentially Districts 1, 3, 4, 8, and 20.

Only if this Court agrees with this analysis can the District Court's judgment be affirmed. This analysis is unsupported by this Court's prior decisions or by the language of the Act, and is in fact contradicted by positions taken by the Solicitor General himself in *Thornburg v. Gingles,* No. 83-1968.

As the Solicitor General correctly notes, Brief for the United States at 6, § 14(c)(1), 42 U.S.C. 19731(c)(1), extends the protection of the Act to "all action necessary to make a vote effective." This Court recognized in *City of Rome* that the practice of single-shot voting may be necessary to make a vote effective in the context of elections for multi-member representative bodies, such as the City Commission and Board of Education involved in that case. The Court explained:

> "Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the

> majority is divided among a number of candidates." U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206-207 (1975).

446 U.S. at 184 n.19. The Court found that changes inhibiting single-shot voting "would dilute Negro voting strength." *Id.*, at 183. This Court thus recognized that minorities may wish to use strategic voting to maximize their influence in representative bodies, and, thus, laws which either enhance or inhibit that potential come within § 14's definition of "action necessary to make a vote effective."

Neither this Court nor any other has ever recognized that minorities have a legitimate interest in using single-shot voting to elect individual judges who do not sit with other judges in a representative capacity and who are bound by law to serve, not the interests of minority voters, but the law itself. This Court has explicitly recognized that judges are not representatives as are executive and legislative officials. *Wells v. Edwards,* 409 U.S. 1095 (1973), aff'g, 347 F. Supp. 453 (M.D.La. 1972); *Holshouser v. Scott,* 409 U.S. 807 (1972), aff'g, 335 F. Supp. 932 (M.D.N.C. 1971). Concepts of dilution, devised in the context of legislative and executive representation, simply have no application to the election of trial judges.[1] As this Court has previously noted in the representative context, "More generally, still in suspense is definitive judgment about the long-range impact of voting systems and malapportionment on legislative output." *Whitcomb v. Chavis,* 403 U.S. 124, 154 n.33 (1971). Clearly, the effect of single-shot voting on judicial output must be even more unclear. This Court certainly cannot conclude without argument that such voting systems have a potential for discrimination in a judicial context.

---

[1]The Solicitor General fails to comprehend this point at page 7 of this brief. The point is not merely that this Court has refused to apply one-man one-vote doctrine to the judiciary, but that this Court has refused so to apply *Reynolds v. Sims,* 377 U.S. 533 (1964). *Reynolds* is the source of both the one-man one-vote doctrine and the dilution doctrine. See also *Fortson v. Dorsey,* 379 U.S. 433 (1965). See generally Jurisdictional Statement at 7-9. Both concepts are inextricably bound up with the area of representation, not the judiciary. Moreover, the extension of the dilution doctrine to the judiciary carries the potential for even further politicization of the bench. Cf. *Bandemer v. Davis,* 603 F. Supp. 1479 (S.D. Ind. 1984), prob. juris. noted, _____ U.S. _____, 105 S. Ct. 1840 (1985).

It is apparent from the Assistant Attorney General's letter that the only potential for discrimination which he finds in North Carolina's judicial system is the claim which the Solicitor General has already rejected in his analysis of North Carolina's legislative system. "[I]f the 'gravamen' of appellees' claim is simply that North Carolina chose to use multimember districts where 'there are sufficient concentrations of black voters to form majority black single-member districts' (J.S. App. 4a), their claim necessarily falls short of establishing a violation." Brief for the United States at 21, *Thornburg v. Gingles*, No. 83-1968. But it is quite plain that no right of minority voter to elect minority candidate exists. "But the right to equal participation in the political process does not protect any 'political group,' however defined, from electoral defeat." *City of Mobile v. Bolden*, 466 U.S. 55, 77 (1980) (Opinion of Stewart J.).[2] See generally Jurisdictional Statement at 10.

No one has better explained this principle than the Solicitor General himself, at page 31 of his brief in *Thornburg v. Gingles*:

> It was firmly settled prior to 1982 that no person had the right to be represented by members of any particular group to which he belongs or to participate in an electoral process that maximizes his chances of success, either as a voter or a candidate. Rather, the principle repeatedly endorsed was the right to participate in an electoral process—to vote, first and foremost, but also to join a political party, to participate in its affairs, to become a candidate (*Whitcomb*, 403 U.S. at 149-150)—in which there is no "built-in bias" against the opportunity to participate (*id.*, at 153). Amended Section 2 reaffirmed these principles. See Senate Report 23-24, 30.

---

[2]The Solicitor General relies upon this Court's agreement in *City of Mobile* that the former version of § 2 of the Voting Rights Act, 42 U.S.C. 1973, is identical to the Fifteenth Amendment to imply that this Court would approve the application of that amendment to intentional discrimination in the design of judicial election systems in *Voter Information Project, Inc., v. City of Baton Rouge*, 612 F. 2d 208 (5th Cir. 1980). Brief for the United States at 6-7 & n.6. As this Court well knows, the plurality in *City of Mobile* concluded that the Fifteenth Amendment guarantees nothing more than the right to register and vote free from racial discrimination. 446 U.S. at 65-66 (Opinion of Stewart, J.) A majority of this Court has never disagreed with that statement, nor has any other Court ever agreed with the Fifth Circuit's position in *Voter Information Project*.

If this Court's forthcoming decision in *Thornburg* agrees with the Solicitor General that minority voters have no right to elect minority candidates, or if the concept of dilution simply does not apply outside a representative context, then the ability to engage in single-shot voting is not "necessary to make a vote effective," and there is no potential for discrimination which would subject these enactments to § 5 coverage.

The Solicitor General's contention that the application of § 5 to judicial elections is supported by consistent administrative practice and legislative intent is little short of ludicrous. This Court has noted that a "contemporaneous administrative construction of the Act is persuasive evidence of the original understanding." *United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110, 131 (1978). The statements of a former assistant attorney general and a former acting assistant attorney general for civil rights, Jurisdictional Statement, App. at A-13, A-14, A-48, A-49, clearly establish that the "contemporaneous administrative construction" was that § 5 did not apply to judicial elections. The fact that the Department of Justice has apparently since changed its position does not shed any light at all on "the original understanding." As this Court has reiterated just this month:

> The fact that the agency's interpretation "has been neither consistent nor long-standing...substantially diminishes the deference to be given to [its] present interpretation of the statute." *Southeastern Community College v. Davis,* 442 U.S. [397,] 412, n. 11 [(1979)] (citing *General Electric Co. v. Gilbert,* 429 U.S. 125, 143 (1976)).

Bowen v. American Hospital Ass'n, _____ U.S. _____, No. 84-1529, slip. op. at 34 n.34 (June 9, 1986) (Opinion of Stevens, J.)

The administrative record is decidedly weak. The Solicitor General asserts that on four separate occasions between 1968 and 1974 the Department failed to object to submissions involving judgeships. None of the letters from the Department of Justice in those cases contained a clear assertion of jurisdiction; a simple failure to object is hardly a reasoned determination that jurisdiction exists. Only twice in the 20-year history of the Act, prior to this case, has the Attorney General maintained an

objection to enactments involving the judiciary; both took place in Alabama, one in 1972, and the other in 1976. The Solicitor General is not even forthright enough to admit that the objections to the creation of judgeships in Louisiana were in fact withdrawn. Extension of the Voting Rights Act: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 2260 (1981).[3]

The Solicitor General's implication that Congress has approved this supposed "contemporaneous administrative construction" is even harder to credit. The two Alabama objections are found in a small-print chart as an appendix to the hearings before a House Judiciary Subcommittee. *Id.*, at 2246-47. The Solicitor General cites no evidence that any member of Congress or any witness from the Department of Justice ever actually spoke or wrote a single word concerning the application of § 5 to the judiciary. A legitimate effort to explain legislative intent would involve an analysis of the words of members of Congress themselves, much like that performed by the Solicitor General in his brief in *Thornburg v. Gingles,* No. 83-1968, at 7-19. It is not a treasure hunt for buried footnotes.

Nor is the complete silence of Congress on the subject of the application of § 5 to the judiciary a matter of such inconsequence as the Solicitor General suggests. Brief for the United States at 6 n. 5. Just this month this Court has rejected a similar attempt by the Solicitor General to defend with Congressional silence an effort to impose vast new federal controls upon an area traditionally left to the States. As the plurality explained:

> . . . Congress has failed to indicate, either in the statute or the legislative history, that it envisioned federal superintendence of treatment decisions traditionally entrusted to state governance. "[W]e must assume that the implications and limitations of our federal system

---

[3]The Louisiana enactments involved the creation of two judgeships in the City of Baton Rouge "to be elected at-large by majority-vote to a designated post." These structures, which inhibit single-shot voting, are similar to those found in North Carolina. The Solicitor General completely fails to explain why the North Carolina procedures have the potential for discrimination while the Louisiana procedures do not. This Court's summary affirmance of the District Court's judgment will give no guidance to State officials who must wrestle with the Department's inexplicable and capricious changes of position.

> constitute a major premise of all congressional legislation, though not repeatedly recited therein." *United States v. Gambling Devices,* 346 U.S. 441, 450 (1953) (opinion of Jackson, J.). Congress therefore "will not be deemed to have significantly changed the federal-state balance," *United States v. Bass,* 404 U.S. 336, 349 (1971)—or to have authorized its delegates to do so—"unless otherwise the purpose of the Act would be defeated," *Trade Comm'n v. Bunte Bros.,* 312 U.S. 349, 351 (1941).

Bowen v. American Hospital Ass'n, supra, slip op., at 32 (June 9, 1986) (Opinion of Stevens, J.) (footnotes omitted). See also *Pierson v. Ray,* 386 U.S. 547 (1967). The Solicitor General has not made the slightest showing that "the purpose of the Act would be defeated" if the Department of Justice is not authorized to veto routine decisions by a State on the structure of its judiciary.

Had Congress intended to confer such power on the Department of Justice, clearly that proposal would have attracted public attention. As the plurality reasoned in *Bowen,* the absence of such attention indicates the absence of any such intent:

> As the Court of Appeals noted, there is nothing in the legislative history that even remotely suggests that congress contemplated the possibility that "section 504 could or would be applied to treatment decisions, involving defective newborn infants." [*United States v. University Hospital,*] 729 F.2d 144, 159 ([2d Cir.] 1984).
>
> "'As far as can be determined, no congressional committee or member of the House or Senate ever even suggested that section 504 would be used to monitor medical treatment of defective newborn infants or establish standards for preserving a particular quality of life. No medical group appeared alert to the intrusion into medical practice which some doctors apprehend from such an undertaking, nor were representatives of parents or spokesmen for religious beliefs that would be affected heard.'" *Id,* at 158 (quoting *American Academy of Pediatrics v. Heckler,* 561 F. Supp. [395,] 401 [(D.D.C. 1983)].

Bowen v. American Hospital Ass'n, slip op. at 32-33 n.33. (Opinion of Stevens, J.). Similarly, the views of bar groups, judges, and state officials have never been heard by Congress in considering whether to grant the Department of Justice such authority over state officials. As in *Bowen*, the inevitable conclusion is that Congress never had any such intent.

The inescapable truth is that the only possible basis for the application of § 5 to the judiciary is this Court's opinion in *Allen*. Neither the Solicitor General, the appellees, nor the District Court has even attempted to explain why the District Court's judgment in this case is an inevitable or even a proper extension of *Allen*. Such an extension of *Allen* raises several troubling questions. The Solicitor General's brief does nothing to resolve them; indeed, it heightens the concern felt by the State.

The Solicitor General asserts, "It is not necessary to the resolution of this case for the Court to consider whether changes in jurisdictional amounts or redistribution of trial and appellate jurisdiction are changes affecting voting (see J.S. 14)."[4] Brief for the United States at 7-8 n.9. However, this Court should be aware of the Department's schizophrenic approach to this issue. Two courts have already ruled that § 5 preclearance is required where "the change involved reallocates governmental powers among elected officials voted upon by different constituencies." *Horry County v. United States*, 449 F. Supp. 990, 995 (D.D.C. 1978). Accord, *Hardy v. Wallace*, 603 F. Supp. 174, 178-79 (N.D. Ala. 1985). The *Hardy* case is especially disturbing, since it reproduces the letters of the Assistant Attorney General as Appendices A and B to its opinion. *Id.*, 179-82. In his letter of June 18, 1984, the Assistant Attorney General interposed an

---

[4]Nor is it necessary to the resolution of this case for this Court to consider the applicability of § 5 to "statutes that abridge the right of blacks to vote for judges." Brief for the United States at 7. Any enactment restricting access to the ballot itself would require preclearance under § 5 as a "voting qualification or prerequisite to voting." "That is not what the statutes at issue do." *Id.*, at 7-8 n.9. These statutes deal with the structure of North Carolina's judicial system, and the District Court found them to constitute a "standard, practice, or procedure with respect to voting" within the meaning of § 5. Jurisdictional Statement, App., at A-5. The issue presented by this appeal is whether that holding was correct.

objection based on *Horry County*. In his letter of October 31, 1984, he withdrew that objection, but indicated that *Horry County* would apply under certain circumstances. North Carolina and her sister States certainly deserve the full consideration of this Court before being required to submit their jurisdictional statutes to a Justice Department that plainly does not know what to do with them.

Even more disturbingly, the Solicitor General offers the completely gratuitous suggestion that "if blacks within any given judicial district do not have an equal opportunity to elect candidates of their choice to the bench, that may well violate Section 2." Brief for the United States at 7. The Solicitor General apparently cannot read a simple statute. Under § 2(b) of the Act, 42 U.S.C. 1973(b), the voters are entitled to an equal opportunity "to participate in the political process and to elect *representatives* of their choice." (Emphasis added) In the decision from which that language was drawn, this Court used the word "legislators." *White v. Regester,* 412 U S. 755, 766 (1973). When Congress abandoned this Court's word, it could have chosen the word "candidates," but did not choose to do so, plainly recognizing that the concept of dilution applies only to representatives and not to those officials, like judges, who do not serve in a representative capacity. The application of § 2 to the judiciary would extend the Act's impact on the structure of the judiciary, not only to those States covered by § 5, but to all fifty States.

Indeed, the Solicitor General is not alone in his implication that the District Court's decision in this case necessarily requires the application of § 2 as well to the judiciary. The United States District Court for the Southern District of Mississippi has concluded that black plaintiffs have shown a substantial likelihood of success on the merits of their challenge under § 2 to the use of multi-member judicial districts in that State. Accordingly, the Court has issued a preliminary injunction barring this year's judicial elections in that State. *Kirksey v. Allain,* Civ. No. J85-0960(B) (May 28, 1986).[5]

---

[5]The order was premised upon an earlier opinion of May 21, 1986, explaining an earlier order of April 3, 1986, of a three-judge court in the same case enjoining elections in some judicial districts for failure to submit new statutes under § 5. In support of its decision, the Court specifically relied upon the District Court's decision in this case. The order of the three-judge District Court has been appealed to this Court. Copies of the order, opinion, and notice of appeal have been lodged with the Clerk and served upon other counsel.

Thus, the disruption of the judicial systems of other States by the District Court's judgment in this case is not merely potential, but actual. The question of whether § 5 of the Voting Rights Act should be applied at all to the structure of a state's judiciary is one of first impression. That question necessarily includes the question of whether the specific structures of North Carolina's judicial system carry a potential for discrimination; the resolution of that question turns upon whether this Court should extend its previous dilution cases to cover the judiciary, likewise a question of first impression. These are undeniably substantial federal questions. It would be peculiarly inappropriate for this Court to affirm the District Court's judgment summarily without giving North Carolina and other affected jurisdictions a full opportunity to be heard.

CONCLUSION

For the reasons stated herein and in the Jurisdictional Statement, this Court should note probable jurisdiction and reverse the judgment of the District Court.

Respectfully submitted,

LACY H. THORNBURG
ATTORNEY GENERAL,
STATE OF NORTH CAROLINA

*James Wallace, Jr.
Assistant Attorney General
Office of the Attorney General
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7218

Attorneys for Appellants
*Counsel of Record

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three (3) copies of the foregoing Jurisdictional Statement upon the persons indicated below by depositing same in the United States mail, first-class postage prepaid, addressed to the following:

Mr. Allen Foster
Mr. Kenneth Gumbiner
Attorneys at Law
P.O. Drawer 20004
Greensboro, NC 27420

The Honorable Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

This the 17 day of June, 1986

James Wallace, Jr.
Assistant Attorney General
State of North Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 02 1986
CLARENCE A. PIERCE, CLERK
BY _____ DEPUTY

HENRY KIRKSEY, ET AL., individually and on behalf of all others similarly situated,

Plaintiffs

versus

CIVIL ACTION
NO. J85-0960(B)

WILLIAM A. ALLAIN, ET AL.,

Defendants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William A. Allain, Governor of Mississippi, Edwin L. Pittman, Attorney General of Mississippi, and Dick Molpus, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners, and the Mississippi State Board of Election Commissioners, Defendants in the above captioned action, hereby appeal to the Supreme Court of the United States from the final order and injunction entered in this action on 3 April, 1986.

This appeal is taken pursuant to 28 U.S.C. Sec. 1253 and 42 U.S.C. Sec. 1973c.

This the 2nd day of May, 1986.

EDWIN LLOYD PITTMAN
ATTORNEY GENERAL OF THE
STATE OF MISSISSIPPI

Stephen J. Kirchmayr
Deputy Attorney General

Betty Morgan Benton
Special Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone (601) 359-3680

Hubbard T. Saunders, IV
Special Counsel
Crosthwait, Terney & Noble
Post Office Box 2398
Jackson, Mississippi 39225-2348
Telephone (601) 352-5533

ATTORNEYS FOR STATE DEFENDANTS

CERTIFICATE OF SERVICE

I, Stephen J. Kirchmayr, one of the Attorneys for the State Defendants, hereby certify that I have this day mailed via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Notice of Appeal To the Supreme Court of the United States to the following persons at their last known mailing address:

Carroll Rhodes, Esquire
Post Office Box 588
Hazlehurst, Mississippi 39083

Johnnie E. Walls, Jr., Esquire
Walls, Buck & Irving
Post Office Box 634
Greenville, Mississippi 38701

William L. Robinson, Esquire
Samuel Issacharoff, Esquire
Patricia M. Hanrahan, Esquire
Lawyers' Committee for Civil Rights Under Law
1400 Eye Street, N.W.
Suite 400
Washington, D. C. 20005

Attorneys for Plaintiffs

Frederick Slabach, Esquire
Mississippi Democratic Party
Post Office Box 1583
Jackson, Mississippi 39205

Attorney for Defendant
Mississippi Democratic Party Executive Committee

Michael S. Allred, Esquire
Salterfield & Allred
Post Office Drawer 1120
Jackson, Mississippi 39215-1120

Attorney for Defendant
Mississippi Republican Party Executive Committee

This the 24 day of May, 1986.

Stephen J. Kirchmayr

Stephen J. Kirchmayr

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 21 1986
CLERK
BY DEPUTY

HENRY KIRKSEY, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. J85-0960(B)

WILLIAM A. ALLAIN, ET AL. DEFENDANTS

MEMORANDUM OPINION AND ORDER

Plaintiffs, a class consisting of 25 black, registered voters in Mississippi, filed suit alleging Defendants[1] violated the Fourteenth and Fifteenth Amendments and §§2 and 5 of the Voting Rights Act of 1965, as amended, by failing to: (1) submit for preclearance under §5 of the Voting Rights Act certain Missis-

sippi statutes pertaining to judicial elections; (2) adhere to the "one-person, one-vote" principle in the creation of chancery and circuit court districts in Mississippi; and (3) draw district lines for judicial elections which do not dilute black voting strength. Plaintiffs also claim that the use of multi-member judicial districts for the election of some judges dilutes black voting strength in violation of §2 of the Voting Rights Act and

---

[1]Defendants are: William A. Allain, Governor of Mississippi; Edwin L. Pittman, Attorney General of Mississippi; Dick Molpus, Secretary of State of Mississippi; in their official capacities and as members of the Mississippi State Board of Election Commissioners; State Board of Elections Commissioners; State of Mississippi Democratic Party Executive Committee, by and through its Chairman, Steve Patterson; and State of Mississippi Republican Party Executive Committee, by and through its Chairperson Ebie Spivey.

the Fourteenth and Fifteenth Amendments. This matter is presently before the Court on Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary or Permanent Injunction and/or a Declaratory Judgment, requesting the three-judge court[2], convened pursuant to 28 U.S.C. §2284 and 42 U.S.C. §1973(c), to: (1) declare that certain Mississippi statutes pertaining to state judicial elections are subject to §5 of the Voting Rights Act; and (2) enjoin enforcement of those statutes which have not been precleared pending compliance with §5 of the Voting Rights Act.

Following oral argument on Plaintiffs' Motion, the three-judge court delivered a bench opinion, holding that: (1) §5 of the Voting Rights Act applies to Mississippi legislative and executive action which establishes or seeks to administer any voting qualification or prerequsite to voting, or standard, practice or procedure with respect to voting for judicial elections; (2) enforcement or implementation of any Mississippi legislative or executive action which establishes or seeks to administer any voting qualification or prerequisite to voting, or standard, practice or procedure pertaining to the conduct of judicial elections which is different from that in force and effect on November 1, 1964, the effective date of the Voting Rights Act, or

---

[2]On March 25, 1986, a three-judge court, composed of Chief Judge Charles Clark for the United States Court of Appeals for the Fifth Circuit and Judges William H. Barbour, Jr. and Henry T. Wingate for the United States District Court for the Southern District of Mississippi, was convened to determine whether the changes in voting for judicial elections are covered by §5 of the Voting Rights Act of 1964, as amended, 42 U.S.C. §1973(c), and, if so, whether Defendants have implemented the changes without preclearance, and if so, what relief is appropriate. See, e.g., Lockhart v. United States, 460 U.S. 125 (1983).

which is different from a statute that has been precleared pursuant to §5 should be enjoined; and (3) legislative recodification of Mississippi statutes which do not change the voting qualifications or prerequisites to voting, or standards, practices or procedures with respect to voting for judicial elections as they existed on November 1, 1964, or as precleared by the United States Attorney General should not be enjoined. This Opinion states the reasons for the ruling of the three-judge court.

Section 5 of the Voting Rights Act, 42 U.S.C. §1973(c), requires a State to submit "any voting qualification or prerequisite to voting, or standard, practice or procedure. . . different from that in force and effect on November 1, 1964" to the Attorney General for preclearance or institute an action in the United States District Court for the District of Columbia for a declaratory judgment that any such qualification, prerequisite to voting, or standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. The United States Supreme Court, "[a]fter canvassing the legislative history of the [Voting Rights] Act," concluded that Congress, by enacting the Voting Rights Act, meant "to reach any state enactment which altered the election law of a covered State in even a minor way." Dougherty County, Georgia Board of Education v. White, 439 U.S. 32, 37 (1978) (quoting Allen v. State Board of Elections, 393 U.S. 544 (1969)). Indeed, the Supreme Court in Allen stated that Congress intended §5 to reach "all changes, no matter how small. . . ." 393 U.S. at 568.

In cases following Allen which interpreted §5, the Supreme Court has "consistently adhered to the principles of broad construction set forth in Allen." Dougherty County, Georgia Board of Education v. White, 439 U.S. at 38. This principle of broad construction recently led the United States District Court for the Eastern District of North Carolina, in Haith v. Martin, 618 F.Supp. 410, 413 (E.D.N.C. 1985), pet. for cert. filed, 54 U.S.L.W. 3463 (Dec. 6, 1985), to hold that ". . .the fact that an election law deals with the election of the judiciary does not remove it from the ambit of §5." Given the expansive interpretation of the Voting Rights Act and §5, this Court is compelled to agree with the pronouncement in Haith v. Martin.

Defendants urge us to reject the holding in Haith v. Martin and exempt judicial elections from the scope of §5 because: (1) §2(b) of the Voting Rights Act demonstrates that the Act applies only to "representatives"; (2) the Voting Rights Act and its dilution concept do not apply to judicial elections; and (3) the State relied upon the interpretation of the United States Department of Justice that the Act excludes judicial elections.

Section 2(b) of the Voting Rights Act, 42 U.S.C. §1973(b), states that:

> A violation of [the Act]. . .is established if. . .it is shown that the political processes leading to nomination or election. . .are not equally open to participation by members of a class of citizens protected by [the Act] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. [Emphasis added].

Defendants argue that since the term "representative" does not include judges, see, e.g., Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd., 409 U.S. 807 (1972); Buchanan v. Rhodes, 249 F.Supp. 860 (M.D.Ohio 1966), appeal dismissed, 385 U.S. 3 (1966), then the Voting Rights Act does not apply to judicial elections. However, §5 of the Voting Rights Act does not contain such a limitation. Section 5 states that any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964, must be submitted for preclearance to the Attorney General or be declared by the United States District Court for the District of Columbia not to have the purpose or effect of denying or abridging the right to vote on account of race or color. Clearly, the unqualified language of §5 coupled with the expansive interpretation given §5 by the United States Supreme Court mandates that judicial elections are subject to §5 of the Votihg Rights Act. As stated in Haith v. Martin, 618 F.Supp. at 413, ". . .the Act applies to all voting without any limitation as to who, or what, is the object of the vote."

Defendants next rely on decisions holding that the dilution concept under the Fourteenth and Fifteenth Amendments does not apply to state judicial elections. Defendants' reliance on these decisions is misplaced. None of these decisions dealt with, or attempted to interpret, the Voting Rights Act. Accordingly, these decisions have no application here where the Voting Rights Act is at issue.

Finally, Defendants submit that the Voting Rights Act does not apply to the state judiciary because the Department of Justice has interpreted the Act as not applying to the state judiciary.[3] Even assuming administrative interpretations are to be given deference in this field of the law, cf. United States v. Board of Comm'rs of Sheffield, 435 U.S. 110 (1978), these Defendants cannot claim reliance on the administrative interpretations of the Department of Justice. In the past, these Defendants have sought and obtained from that Department preclearance of statutes pertaining to judicial elections. Indeed, the record before us fails to show that the Department of Justice has ever refused to consider a statute submitted to it by Mississippi on the ground that the statute pertained to judicial elections.

Alternatively, Defendants submit that certain statutes challenged by Plaintiffs are merely a recodification of laws that existed prior to the effective date of the Act and, therefore, are not subject to §5. The Court agrees. Section 5 is triggered only in instances where the voting qualification or prerequisite to voting, or standard, practice or procedure for voting is "different from" that in full force and effect on November 1, 1964. To the extent that recodification of laws does not change the voting qualification or prerequisite to voting, or standard,

---

[3]The Court notes that Defendants offered no proof to show that the Department of Justice does indeed interpret the Act to exclude judicial elections, nor has done so in the past, and merely argued this position in opposition to Plaintiffs' Motion.

practice or procedure for voting as it existed on November 1, 1964, or as precleared, those particular laws are not subject to §5 or the injunction ordered by this Court.

Accordingly, Plaintiffs' Motion for a Temporary Restraining Order and Preliminary or Permanent Injunction and/or a Declaratory Judgment is hereby granted pending preclearance of the affected statutes or further order of this Court.

ORDERED this the 21st day of May, 1986.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 28 1986
CLARENCE A. PIERCE, CLERK
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HENRY KIRKSEY, et al.,
on behalf of themselves
and all others similarly
situated,

Plaintiffs,

NATHAN P. ADAMS, JR. AND
NAT W. BULLARD,

Plaintiffs-Intervenors,

v. CIVIL ACTION NO. J85-0960(B)

WILLIAM A. ALLAIN, Governor of
Mississippi, et al.,

Defendants.

ORDER

This civil action came on for hearing on May 27, 1986, on the plaintiffs' Motion for A Temporary Restraining Order and/or Preliminary and/or Permanent Injunction which the court and the parties have treated as a request for preliminary injunctive relief enjoining the defendants from conducting any elections for the offices of circuit judge in the State of Mississippi, chancery judge in the State of Mississippi, and county judge in only Harrison County, Hinds County, and Jackson County, Mississippi, pending this court's trial and decision on the merits of the plaintiffs' claims for relief under

Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973, 42 U.S.C. § 1983, and the Fourteenth and Fifteenth Amendments to the United States Constitution and the entry of a future order of the court rescheduling such elections.

Having considered the motion, the supporting and opposing briefs, the documentary evidence received into evidence at the hearing, and the four well-established prerequisites for the granting of a preliminary injunction, see, e.g., Canal Authority v. Callaway, 489 F.2d 567, 572-77 (5th Cir. 1974), the court rendered a bench opinion at the conclusion of the hearing in which it stated its findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a). For the reasons stated in that bench opinion, the court hereby rules that plaintiffs have satisfied the conditions for a preliminary injunction:

1. Plaintiffs have shown a likelihood of success on the merits. In light of the exhibits presented to this court, plaintiffs have shown that they will probably prove a history of past racial discrimination in Mississippi which has an effect upon the ability of black citizens of Mississippi to elect judicial candidates of their choice; racially polarized voting in Mississippi elections; socio-economic disparities between black and white

citizens of Mississippi, with blacks being less affluent and less well educated; a lack of prior electoral success by black judicial candidates in contested elections; and that at the trial on the merits the key issue will be the continued use of multi-member districts. Plaintiffs have therefore shown some probability of success on the merits.

2. Irreparable injury will ensue to the black plaintiff class should elections go forward and the present electoral system ultimately be found in violation of the rights protected by the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution. Additionally, irreparable injury will befall plaintiff-intervenors, the incumbent Chancery Court judges for the Ninth District, should elections go forward, campaign expenses be incurred, and such elections be nullified by subsequent order of this court.

3. The relative harm to plaintiffs from the denial of an injunction will exceed the harm to defendants from the granting of such an injunction. Defendants have pointed to the risk of lower vote turnout should the elections not be held as scheduled as the only identifiable potential harm to the state defendants.

4. The public interest will best be served by the granting of an injunction. In light of the order of April 3, 1986, by a three-judge court in this matter enjoining

some of the judicial elections under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the risk of confusion to the voters of divergent election dates for the challenged judgeships, the need to hold new elections should plaintiffs prevail, and the possible preclusion of special appointments of incumbent judges who were defeated at the polls, this court finds that the best interests of all concerned are met by entering the following injunction.

Therefore, the court finds and concludes that the plaintiffs' motion is meritorious and should be granted.

IT IS, THEREFORE, ORDERED AND ADJUDGED:

1. That, pending a final decision by this court in this action and the entry of a future order of this court scheduling elections for the affected judicial offices, defendants William A. Allain, in his official capacity as Governor of Mississippi and as a member of the State Board of Election Commissioners; Edwin L. Pittman, in his official capacity as the Attorney General of Mississippi and as a member of the State Board of Election Commissioners; Dick Molpus, in his official capacity as Secretary of State of Mississippi and as a member of the State Board of Election Commissioners; the Mississippi State Board of Election Commissioners; the Democratic

Party of the State of Mississippi State Executive Committee; and the State of Mississippi Republican Party State Executive Committee, and their officers, agents, servants, employees, and attorneys (the defendants) are hereby ENJOINED AND PROHIBITED from conducting any primary election or general election in the State of Mississippi for all circuit judge offices in the State of Mississippi, all chancery judge offices in the State of Mississippi, and the county court judge offices in Harrison, Hinds, and Jackson Counties;

2. That, given the nearness of the June 3, 1986, primary and the fact that ballots have been prepared for the primary election which include the offices subject to this injunction, the court hereby directs how the defendants and all other election officials may comply with the injunction contained in Paragraph 1 above:

A. That, in the event that any ballots have not been finalized, the defendants and all other election officials are directed to delete from any such ballot the offices subject to the injunction contained in Paragraph 1 above;

B. That, in the event that ballots have been prepared which include the offices subject to the injunction contained in Paragraph 1, the defendants and all other election officials need not prepare new ballots. However, the defendants and all other election

officials are hereby directed not to tabulate, total, tally, recap, publish, disclose, reveal, or otherwise disseminate any votes or the number of votes which may be cast for the offices which are subject to this injunction;

C. That, in those counties utilizing voting machines which can "block out" from voting by the electors these particular offices subject to this injunction, the defendants and all other election officials are directed to "block out" such offices; and

D. That, in those counties utilizing voting machines which cannot mechanically "block out" selected offices on the previously prepared ballot, the defendants and all other election officials are enjoined not to publish, disclose, reveal, or otherwise disseminate any totals or tallies which may be automatically recorded by such machines for the particular offices which are subject to this injunction;

3. That the defendant Secretary of State is hereby directed to give prompt telephonic notification to all state and county Democratic and Republican Party Executive Committees and all circuit clerks/county registrars of the provisions of this injunction and the Secretary of State shall follow-up on such telephonic notification by mailing a written notice; and

4. That the injunction contained in this order applies only to all offices of circuit judge in the State of Mississippi, all offices of chancery judge in the State of Mississippi, and all county judge offices in Harrison, Hinds, and Jackson Counties, Mississippi. This order does not apply to any other offices which may be on the ballot on June 3, 1986, or thereafter, and it specifically does not apply to or affect the election of:

Supreme Court Justices;

County Judge in those counties which have a county court and only one county judge: Adams, Bolivar, Coahoma, DeSoto, Forrest, Jones, Lauderdale, Lee, Leflore, Lowndes, Madison, Pike, Rankin, Warren, Washington, and Yazoo Counties;

Youth Court Judge in Clay County; or

Family Court Judge in Harrison County.

SO ORDERED AND ADJUDGED, on this, the 23rd day of May, 1986.

/s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Carroll Rhodes
Attorney for Plaintiffs

Stephen J. Kirchmayr
Deputy Attorney General
Attorney for State Defendants

Samuel Issacharoff
Attorneys for Plaintiffs

Hubbard T. Saunders, IV
Attorney for State Defendants